

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 SOUTHERN DIVISION  
11

12 TAMMY J. BARRERA, ) No. SACV 08-1084 (CW)  
13 )  
14 Plaintiff, ) DECISION AND ORDER  
15 v. )  
16 MICHAEL J. ASTRUE, )  
17 Commissioner, Social )  
Security Administration, )  
Defendant. )  
\_\_\_\_\_ )

18  
19 The parties have consented, under 28 U.S.C. § 636(c), to the  
20 jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks  
21 review of the Commissioner's denial of disability benefits. As  
22 discussed below, the court finds that the Commissioner's decision  
23 should be reversed and this matter remanded for further proceedings.

24 I. BACKGROUND

25 Plaintiff Tammy Barrera was born on December 12, 1964, and was  
26 forty-three years old at the time of her last administrative hearing.  
27 [Administrative Record ("AR") 64, 143.] She has a high school  
28 education and past relevant work experience as an executive

1 administrative secretary. [AR 18.] Plaintiff alleges disability on  
2 the basis of bipolar disorder. [AR 86.]

## 3 **II. PROCEEDINGS IN THIS COURT**

4 Plaintiff's complaint was lodged on September 29, 2008, and filed  
5 on October 14, 2008. On April 22, 2009, Defendant filed an Answer and  
6 Plaintiff's Administrative Record ("AR"). On June 19, 2009, the  
7 parties filed their Joint Stipulation ("JS") identifying matters not  
8 in dispute, issues in dispute, the positions of the parties, and the  
9 relief sought by each party. This matter has been taken under  
10 submission without oral argument.

## 11 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

12 Plaintiff applied for disability insurance benefits ("DIB") under  
13 Title II of the Social Security Act on December 14, 2005, alleging  
14 disability since October 4, 2005. [AR 11.] After the application was  
15 denied initially, Plaintiff requested an administrative hearing, which  
16 was held on November 5, 2007, before Administrative Law Judge ("ALJ")  
17 Helen E. Hesse. [AR 21.] Plaintiff appeared with counsel, and  
18 testimony was taken from Plaintiff, medical expert Craig Rath, and  
19 vocational expert Steven Berry. [AR 22.] A supplemental hearing was  
20 held on April 21, 2008. [AR 64.] Plaintiff appeared with counsel and  
21 testified. [AR 65.] The ALJ denied benefits in a decision filed on  
22 July 25, 2008. [AR 11-20.] When the Appeals Council denied review on  
23 September 19, 2008, the ALJ's decision became the Commissioner's final  
24 decision. [AR 1-3.]

## 25 **IV. STANDARD OF REVIEW**

26 Under 42 U.S.C. § 405(g), a district court may review the  
27 Commissioner's decision to deny benefits. The Commissioner's (or  
28 ALJ's) findings and decision should be upheld if they are free of

1 legal error and supported by substantial evidence. However, if the  
2 court determines that a finding is based on legal error or is not  
3 supported by substantial evidence in the record, the court may reject  
4 the finding and set aside the decision to deny benefits. See Aukland  
5 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.  
6 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240  
7 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,  
8 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
9 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada  
10 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

11 "Substantial evidence is more than a scintilla, but less than a  
12 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence  
13 which a reasonable person might accept as adequate to support a  
14 conclusion." Id. To determine whether substantial evidence supports  
15 a finding, a court must review the administrative record as a whole,  
16 "weighing both the evidence that supports and the evidence that  
17 detracts from the Commissioner's conclusion." Id. "If the evidence  
18 can reasonably support either affirming or reversing," the reviewing  
19 court "may not substitute its judgment" for that of the Commissioner.  
20 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

## 21 **V. DISCUSSION**

### 22 **A. THE FIVE-STEP EVALUATION**

23 To be eligible for disability benefits a claimant must  
24 demonstrate a medically determinable impairment which prevents the  
25 claimant from engaging in substantial gainful activity and which is  
26 expected to result in death or to last for a continuous period of at  
27 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at  
28 721; 42 U.S.C. § 423(d)(1)(A).

1 Disability claims are evaluated using a five-step test:

2 Step one: Is the claimant engaging in substantial  
3 gainful activity? If so, the claimant is found not  
4 disabled. If not, proceed to step two.

5 Step two: Does the claimant have a "severe" impairment?  
6 If so, proceed to step three. If not, then a finding of not  
7 disabled is appropriate.

8 Step three: Does the claimant's impairment or  
9 combination of impairments meet or equal an impairment  
10 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If  
11 so, the claimant is automatically determined disabled. If  
12 not, proceed to step four.

13 Step four: Is the claimant capable of performing his  
14 past work? If so, the claimant is not disabled. If not,  
15 proceed to step five.

16 Step five: Does the claimant have the residual  
17 functional capacity to perform any other work? If so, the  
18 claimant is not disabled. If not, the claimant is disabled.

19 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended  
20 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107  
21 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20  
22 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or  
23 "not disabled" at any step, there is no need to complete further  
24 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

25 Claimants have the burden of proof at steps one through four,  
26 subject to the presumption that Social Security hearings are non-  
27 adversarial, and to the Commissioner's affirmative duty to assist  
28 claimants in fully developing the record even if they are represented  
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at  
1288. If this burden is met, a prima facie case of disability is  
made, and the burden shifts to the Commissioner (at step five) to  
prove that, considering residual functional capacity ("RFC")<sup>1</sup>, age,

---

<sup>1</sup> Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to

1 education, and work experience, a claimant can perform other work  
2 which is available in significant numbers. Tackett, 180 F.3d at 1098,  
3 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

4 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

5 Here, the ALJ found that plaintiff had not engaged in substantial  
6 gainful activity since her alleged disability onset date (step one);  
7 that plaintiff had "severe" impairments, namely bipolar disorder and  
8 history of substance abuse (step two); and that plaintiff did not have  
9 an impairment or combination of impairments that met or equaled a  
10 "listing" (step three). [AR 13.] The ALJ determined that Plaintiff  
11 had an RFC "to perform a full range of work at all exertional levels  
12 but with the following nonexertional limitations: she is precluded  
13 from climbing ladders. She should avoid unprotected heights,  
14 dangerous or fast moving machinery, and open pools of water. She can  
15 work where no hypervigilance is required, and she is not in charge of  
16 safety operations of others, she has no intense interpersonal  
17 interactions, she does not supervise others, with no high production,  
18 quota or rapid assembly line work. She can work at a moderate pace."  
19 [AR 14.] Plaintiff was unable to perform any past relevant work (step  
20 four). [AR 18.] The vocational expert testified that a person with  
21 Plaintiff's RFC could perform other work in the national economy, such  
22 as laundry worker II, kitchen helper and packager (step five). [AR  
23 19.] Accordingly, the ALJ found that Plaintiff was not under a  
24 disability, as defined by the Social Security Act, through the date of

25 \_\_\_\_\_  
26 work without directly limiting strength, and include mental, sensory,  
27 postural, manipulative, and environmental limitations. Penny v.  
28 Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155  
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a  
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,  
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 the decision. [Id.]

2 **C. ISSUES IN DISPUTE**

3 The parties' Joint Stipulation raises five disputed issues:

- 4 1. Whether the ALJ properly considered the opinion of
- 5 Plaintiff's treating physician, Dr. Brett R. Williams;
- 6 2. Whether the ALJ properly considered the opinion of
- 7 Plaintiff's treating physician, Dr. Hanaa Wadie Fam;
- 8 3. Whether the ALJ properly considered Plaintiff's mental
- 9 impairment;
- 10 4. Whether the ALJ properly considered Plaintiff's seizure
- 11 disorder; and
- 12 5. Whether the ALJ properly considered Plaintiff's testimony.

13 [JS 2-3.]

14 As discussed below, Issue Four is dispositive.

15 **D. SEIZURE DISORDER**

16 In March 2007, Plaintiff underwent a Neurologic Evaluation  
17 conducted by Dr. Paul Maistros. [AR 310-11.] Plaintiff complained of  
18 "blackouts" that started approximately one year earlier. [AR 310.]  
19 Plaintiff's history of bipolar disorder and migraines was noted. [Id.]  
20 Upon neurologic examination, Dr. Maistros noted a clinical impression  
21 of "trance-like behavior associated with fugue states, episodes of  
22 partial complex seizures, and some kind of alternative behavior of  
23 undetermined etiology, or even toxic effect from medication" and  
24 recommended further testing. [AR 311.] The next day, an  
25 electroencephalogram revealed an "abnormal EEG with slightly  
26 disorganized background activity and paroxysmal sharp discharges with  
27 epileptiform potential." [AR 312.] In April 2007, Dr. Maistros gave  
28 an assessment of "partial complex seizures" and prescribed Topamax for

1 Plaintiff's migraines. [AR 304.] A few days later, an MR Imaging of  
2 Plaintiff's brain was "essentially negative" but with the possibility  
3 of a "small calcification" that could either be "of little  
4 significance" or "a small focus of cysticercosis." [AR 305-06.] In  
5 June 2007, Dr. Maistros noted that Plaintiff had not had any seizures  
6 since her prior visit and that "overall, things are settling down, and  
7 the headaches are significantly less." [AR 303.] However, Dr.  
8 Maistros diagnosed Plaintiff with a seizure disorder and recommended  
9 that Plaintiff continue with her medication management. [Id.] The ALJ  
10 rejected Dr. Maistros' opinion as "unreliable" because "the issue of  
11 [Plaintiff's] drug abuse was never addressed by Dr. Maistros" and "he  
12 was apparently unaware of the full parameters of this claimant." [AR  
13 17.]

14 It is well-settled in the Ninth Circuit that the opinion of a  
15 treating physician, even if contradicted by opinions offered by other  
16 medical sources, cannot be rejected unless the Commissioner provides  
17 "specific and legitimate reasons" supported by substantial evidence in  
18 the record. Lester, 81 F.3d at 830. Such reasons were not provided  
19 here with respect to the opinion of Dr. Maistros. The Commissioner's  
20 complete rejection of the opinion was not supported by the record: no  
21 medical professional called into question the evidentiary value of Dr.  
22 Maistros' opinion based on his supposed ignorance of Plaintiff's drug  
23 history, much less provided a basis to reject the opinion in its  
24 entirety. Even assuming that there was some basis to question Dr.  
25 Maistros' opinion on the grounds cited by the Commissioner, rejection  
26 of this evidence was improper at this stage of the five-step inquiry.  
27 See Bustamante v. Massanari, 262 F.3d 949, 955 (9th Cir. 2001)("[A]n  
28 ALJ must first conduct the five-step inquiry without separating out

1 the impact of alcoholism and drug addiction"). Accordingly, reversal  
2 is required.

3 **E. REMAND FOR FURTHER PROCEEDINGS**

4 The decision whether to remand for further proceedings is within  
5 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,  
6 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by  
7 further proceedings, or where the record has been fully developed, it  
8 is appropriate to exercise this discretion to direct an immediate  
9 award of benefits. Harman, 211 F.3d at 1179 (decision whether to  
10 remand for further proceedings turns upon their likely utility).  
11 However, where there are outstanding issues that must be resolved  
12 before a determination can be made, and it is not clear from the  
13 record that the ALJ would be required to find the claimant disabled  
14 and entitled to benefits if all the evidence were properly evaluated,  
15 remand is appropriate. Id.

16 Here, because specific and legitimate reasons based on  
17 substantial evidence in the record were not provided to reject Dr.  
18 Maistros' opinion, it is credited as true. Harman, 211 F.3d at 1178;  
19 Lester, 81 F.3d at 834. Even so, however, Plaintiff's entitlement to  
20 benefits is not clear because Dr. Maistros offered no clear opinion as  
21 to whether Plaintiff had any functional limitations as a result of her  
22 seizures which would direct a finding of disability on the basis of  
23 the current record. Moreover, even if such a finding were directed,  
24 it would not direct an automatic award of benefits in light of  
25 unresolved questions as to whether Plaintiff continues to use drugs  
26 and alcohol and, if so, whether such use is a contributing factor  
27 material to a finding of disability. See Bustamante, 262 F.3d at 954.  
28 Under these circumstances, outstanding issues remain before a finding



1 of disability can be made.<sup>2</sup> Accordingly, remand is appropriate.

2 **VI. ORDERS**

3 Accordingly, **IT IS ORDERED** that:

4 1. The decision of the Commissioner is **REVERSED**.

5 2. This action is **REMANDED** to defendant, pursuant to Sentence  
6 Four of 42 U.S.C. § 405(g), for further proceedings as discussed  
7 above.

8 3. The Clerk of the Court shall serve this Decision and Order  
9 and the Judgment herein on all parties or counsel.

10  
11 DATED: June 30, 2009

12 \_\_\_\_\_/S/\_\_\_\_\_  
13 CARLA M. WOHRLE  
14 United States Magistrate Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

26 \_\_\_\_\_  
27 <sup>2</sup> The problems outlined above would also apply to Plaintiff's  
28 other four claims raised in the Joint Stipulation. See Bustamante,  
262 F.3d at 954.